

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) AMENDED FINAL ORDER
NO. 70402-s76H BY JOSEPH AND)
DENISE GALBRAITH)

* * * * *

In order to clarify the Final Order issued on November 18, 1991, the following amended Final Order is issued.

ORDER

The stock water portion of the Application is denied.

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 70402-s76H is hereby granted to appropriate 585 gallons per minute up to 900 acre-feet of water per year from an unnamed developed spring located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, Township 5 North, Range 20 West, as waste water from an upstream fish hatchery located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9 for a flow through fish pond with a capacity of 4.5 acre-feet to be located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, Township 5 North, Range 20 West. The points of diversion, one is by ditch and the other by pipeline, shall be located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9. The place of use shall be the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ in said Section 8. The period of diversion and use shall be from January 1 through December 31, inclusive of each year.

1. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided

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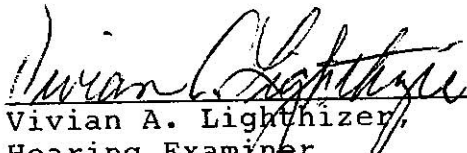
CASE # 70402

evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the amended Final Order.

Dated this 23rd day of March, 1992.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Amended Final Order was duly served upon all parties of record at their address or addresses this 23rd day of March, 1992 as follows:

Joseph and Denise Galbraith
8450 Swanson Circle
Anchorage, AK 99516

David W. and Susan E. France
458 Grant Lane
Hamilton, MT 59840

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 70402-s76H BY JOSEPH AND)	
DENISE GALBRAITH)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. However, there is an error in the Proposed Order on page 21. The first sentence of Item 3 states the Permittee shall install three measuring devices. This is incorrect. The first sentence of Item 3 should read as follows: The Permittee shall install four measuring devices.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 21, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

The stock water portion of the Application is denied.

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use No. 70402-s76H by Joseph and Denise Galbraith is hereby granted to appropriate 585 gpm up to 900 acre-feet of water per year from

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an unnamed developed spring located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, Township 5 North, Range 20 West, as waste water from an upstream fish hatchery located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9 for a flow-through fish pond located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, Township 5 North, Range 20 West, with a capacity of 4.5 acre-feet. The point of diversion shall be located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9. The place of use shall be the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ in said Section 8. The period of diversion and use shall be from January 1 through December 31, inclusive of each year.

1. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana law.

2. This Permit is issued subject to the permanent installation of an adequate drainage device to satisfy existing water rights. This drainage device shall be adjusted to pass through all water except the water measured in the fish hatchery ditch and the water transported to the pond through the pipeline.

3. The Permittee shall install four measuring devices. Two measuring devices shall be installed on Reeser Ditch; one shall be located above the pond and the second shall be located below the discharge of the pond. The third measuring device shall be located in the ditch from the fish hatchery immediately before it enters Reeser Ditch. A fourth measuring device shall be located in the pipe which delivers the waste water to the pond.

4. The Permittee shall pass, without significant diminishment in quantity, quality, and timing, the waters conducted down Reeser Ditch.


5. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time and shall submit said records to the Department upon request. This condition is to be in force only until the Permit is quantified through permit verification.

6. If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 18 day of November, 1991.


Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 19th day of November, 1991 as follows:

Joseph and Denise Galbraith
8450 Swanson Circle
Anchorage, AK 99516

Daly Ditches Irrigation Dist.
534 Tammany Lane
Hamilton, MT 59840

Harold & Marilyn Mildenberger
P.O. Box 633
Hamilton, MT 59840

Alfred B. Newman
538 Fish Hatchery Road
Hamilton, MT 59840

Dorothy E. Palmer
352 Grantsdale Road
Hamilton, MT 59840

John D. Greef
Recht and Greef, P.C.
P.O. Box 149
Hamilton, MT 59840

David W. and Susan E. France
458 Grant Lane
Hamilton, MT 59840

Bernie A. & Elizabeth F. Swift
236 Rose Lane
Hamilton, MT 59840


G. Robert and Joan E. Johnson
324 Grantsdale Road
Hamilton, MT 59840

William & Hazel Lovingood
207 Lincoln Lane
Hamilton, MT 59840

David Pengelly
Knight, MacLay & Masar
P.O. Box 8957
Missoula, MT 59807-8957

Mariel W. George, et al
493 Grant Lane
Hamilton, MT 59840

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 70402-s76H BY JOSEPH AND)
DENISE GALBRAITH)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 7, 1991, in Missoula, Montana to determine whether the above Application should be granted to Joseph and Denise Galbraith under the criteria set forth in § 85-2-311(1), MCA.

Applicants Joseph and Denise Galbraith appeared at the hearing by and through counsel David Pengelly.

Lee Yelin, Water Right Specialist with Land and Water Consulting, appeared as a witness for the Applicants.

Objector Daly Ditches Irrigation District (the District) appeared at the hearing by and through Susie Birse.

Objector Alfred Newman appeared at the hearing pro se.

Objectors G. Robert and Joan E. Johnson appeared at the hearing by and through Joan E. Johnson.

Objectors Bernie A. and Elizabeth F. Swift appeared at the hearing by and through Bernie A. Swift.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

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Objectors David W. and Susan E. France, Dorothy E. Palmer, and G. Robert and Joan E. Johnson have signed objection withdrawal statements in which they agree to the issuance of a Permit for this Application under certain terms, conditions, restrictions, and limitations.

Objectors Harold and Marilyn Mildenberger did not appear at the hearing; therefore, in accordance with ARM 36.12.208, they are in default and their objections are dismissed.

Untimely Objectors William and Hazel Lovingood did not appear at the hearing.

EXHIBITS

Applicants' Exhibit 1 is a copy of an aerial photograph which has been enhanced to show, in blue ink, Applicants' proposed pond, Applicants' proposed pipeline, Bender's sump, and Wolfs' spring, cistern and pipeline.

Applicants' Exhibit 2 is an enlarged copy of page 18 of the Ravalli County Water Resources Survey.

Both Exhibits were entered into the record without objections.

The Department file was made available for review by all parties who had no objections to any part of it. Therefore, it is entered into the record in its entirety.

During the hearing, Michael McLane stated his intent to send the Hearing Examiner a map with the names of roads and other landmarks that had been discussed during the hearing to better allow her to understand some of the data presented at the

hearing. There were no objections to Mr. McLane's proposal. The Hearing Examiner received a photocopy of said map from Mr. McLane on August 12, 1991.

PRELIMINARY MATTERS

The instant Application relied in part on the granting of a permit to Application No. 70369-76H by Jerry and Susan Wolf. Mr. and Mrs. Wolf withdrew their Application; therefore, the Applicants in the instant case modified their Application at the hearing. The flow rate for the flow-through fish pond was reduced to 585 gallons per minute (gpm) which is the amount of water currently claimed by the Wolfs in Statement of Claim No. W108827-76H. The volume of water was reduced accordingly to 900 acre-feet per year.

As part of the objection settlement process, the Applicants deleted the proposed supplemental sprinkler irrigation use further reducing the consumptive use of water to the initial filling of the pond which has a capacity of 4.5 acre-feet and the 7.3 acre-feet of stock water. There was some discussion during the hearing about the amount requested for stock water. The work copy of the Application clearly states the amount of water requested for stock water is 7.3 acre-feet per year. The public notice clearly states that 7.3 acre-feet per year is requested for the stock water use.

An Application for Beneficial Water Use Permit may only be altered after public notice of the application if the changes would not prejudice anyone, party or non-party, i.e., those

persons who received notice of the application as originally proposed but did not object, would not alter their position due to the amendments. See In re Applications No. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the flow rate and volume of water requested annually. See In re Application No. 50272-g42M by Joseph F. Crisafulli.

In the instant case, because Applicants reduced the flow rate and volume of water to be diverted and no party present at the hearing objected, the Hearing Examiner can find no prejudice to anyone. Therefore, the amendment as stated is accepted.

There is an error in the public notice under the "Further Information" remark. It states that the source is waste and seepage from an upstream fish hatchery. There is no reference to seepage on the original application nor on the work copy of the application. This error is inconsequential, therefore the notice need not be republished.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) and (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Joseph and Denise Galbraith duly filed the above-entitled Application with the Department on February 21, 1989, at 10:35 a.m.

3. Pertinent portions of the Application were published in the Ravalli Republic on December 6, 1989.

4. There is some confusion as to the name of the waterway in which the waste water flows. During the hearing it was called the Thompson Ditch, Reeser Ditch, Snake Creek, Snake Creek Drain, Smitty Creek and Smithy Creek. Objector Bernie Swift stated that he has affidavits by older persons who had lived in the area for a long time stating this waterway was called Smitty Creek on maps back in the early years. However, for the sake of simplicity the waterway will be called Reeser Ditch in this Proposal.

5. Applicants propose to divert 585 gpm up to 900 acre-feet of water per year from an unnamed developed spring located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9 as waste water from an upstream fish hatchery located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9 for an on-stream

flow-through fish pond with a capacity of 4.5 acre-feet and 7.3 acre-feet per year for stock water for 230 animal units. The proposed point of diversion is the beginning of the diverting and delivery pipeline in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, Township 5 North, Range 20 West. The dam site is in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8.¹ The proposed place of use for the fish pond is the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and for the livestock is SE $\frac{1}{4}$ NE $\frac{1}{4}$ both in Section 8. The proposed period of diversion and use is from January 1 through December 31, inclusive of each year. (Testimony of Lee Yelin and Department file.)

6. The proposed means of diversion is a buried six-inch graduated to eight-inch pipeline from the bottom of a pond at the fish hatchery which would convey water directly to the Applicants' pond. In addition any water used by the fish hatchery in excess of 250 gpm would be delivered to the Applicants' pond through the existing ditch system to Reeser Ditch. Applicants have made the necessary arrangements with Jerry and Susan Wolf, owners of the fish hatchery to obtain an easement to collect water from the fish hatchery by installing the aforementioned pipeline and to repair and maintain an existing ditch from the hatchery to Reeser Ditch (Testimony of Lee Yelin, Applicants' Exhibit 1, and Department file.)

7. The previous owners of the fish hatchery, J. J. and Elsie B. Stephensen, filed Statement of Claim No. W108827-76H

¹Unless otherwise specified all land descriptions in this proposal are located in Township 5 North, Range 20 West, in Ravalli County.

claiming 400 gpm up to 480 acre-feet per year of the waters of an unnamed spring for fish raceways, a nonconsumptive use. The fish hatchery was later purchased by Jerry W. and Susan B. Wolf who on January 26, 1989, filed a request to amend that Statement of Claim to claim a flow rate of 585 gpm. (Department records.)

8. Applicants' pond was created by an earthen dam which was constructed approximately two years ago across Reeser Ditch. The dam is equipped with a spillway, an overflow stand pipe and an 18 inch corrugated metal pipe in the bottom which is capable of draining the pond completely. The existence of the pond was brought to the Department's attention by a complaint from Daly Ditches Irrigation District. (Testimony of Susie Birse and Lee Yelin.)

9. As part of the objection settlement process, Applicants have agreed to install two measuring devices in Reeser Ditch. One measuring device would be located above the proposed pond and the other would be located below the discharge of the pond. Applicants have also agreed to allow the water to flow through the pond undiminished in quantity, quality and timing. Applicants have further agreed to keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records to the Department upon request. (Department file.)

10. In April of 1990, Lee Yelin took a measurement at the fish hatchery cistern before the high water of spring runoff. At that time, the flow rate was 365 gpm. On August 6, 1991, a flow

rate of 268 gpm was measured going under Fish Hatchery Road. The water measured at that point was not all the water coming out of the hatchery; an equal amount or more was flowing north which could be routed to the Applicants' proposed pond. The owner of the fish hatchery has stated to Mr. Yelin that he has measured water in excess of 700 gpm at his source during high water periods or when his neighbor is irrigating. (Testimony of Lee Yelin.)

11. Applicants own the property where the water is to be put to beneficial use. (Department file.)

12. Although there are other permits in the area which have not been perfected, they are either not on the same source or have a later priority date. There are no planned uses or developments for which water has been reserved. (Testimony of Lee Yelin.)

13. The water table in the area is high. A large portion of Section 9 is wetlands. The fish hatchery takes its water from a spring located in the $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$ of Section 9. Ronald and Janet Trulock have a fish pond located in the $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$ of Section 9 that is dug into the water table. Nancy and Joel Bender have a permit to appropriate waste water and seepage at a point in the $NE\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$ of Section 8 by means of a groundwater sump which is eight feet deep. The Bender's permit would be junior to a permit that would be granted for the instant Application. (Department records, Applicants' Exhibit 2, and testimony of Lee Yelin.)

14. The Benders have rerouted Reeser Ditch as it comes under Fish Hatchery Road. Instead of immediately turning north, the ditch now extends further to the west then turns north. This alteration extends the ditch approximately 1200 yards. Objector Bernie Swift believes this alteration has caused more damage to Reeser Ditch than the Applicants' pond. (Testimony of Lee Yelin, Bernie Swift, Department records, and Applicants' Exhibit 1.)

15. All the Objectors oppose any consumptive use of the water in Reeser Ditch and/or Snake Creek. Reeser Ditch (known by many other names) originates in the SW $\frac{1}{4}$ of Section 9. It then flows in a northwesterly direction across Section 8, 5, and 6, then on to Section 31. Snake Creek (also known as Snake Creek Drain) originates in the SE $\frac{1}{4}$ of Section 9. It flows in a northwesterly direction through Section 5. A ditch from Snake Creek runs along the north boundary of Sections 5 and 6 to Reeser Ditch. (Applicants' Exhibits 1 and 2.)

16. The District diverts water from Skalkaho Creek into the Ward, Hughes, Thompson and Reeser Ditches. The District has decreed rights from Skalkaho Creek; 40 miner's inches to put into the Reeser Ditch and 160 miner's inches to put into the Thompson Ditch. The Thompson and Reeser Ditches merge at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9. The District's decreed water rights do not include the waste water from the fish hatchery. (Testimony of Susie Birse, Lee Yelin, Applicants' Exhibit 2, and Department records.)

17. Ms. Birse stated the District has experienced a "huge" loss of water in Reeser Ditch during the winter the last few years. Ms. Birse indicated she thought the loss was through the bottom of Applicants' pond because it is not lined. However, under cross examination, Ms. Birse stated the District does not deliver water via the Reeser Ditch from September through May. (Testimony of Susie Birse.)

18. The District, through Ms. Birse, stated it has a "real problem" with having to "call" a junior water user for water that belongs to the District.

19. Objectors Swift filed Statement of Claim No. W212068-76H on January 4, 1982, for stock water from Reeser Ditch. This Claim was terminated on February 8, 1982, because Mr. Swift was told he has an existing stock water right which was exempt from filing. The source claimed was Smithey Creek, Hedge Ditch, Skalkaho Drain Ditch and one other illegible name. According to Applicants' Exhibit 2, the source is the waterway referred to as Reeser Ditch. (Department records, Department file and testimony of Bernie Swift.)

20. Objectors Swift have not received enough water down the Reeser Ditch during the last three winters to supply their existing fish pond. Department records reveal that the Swifts have filed Statements of Claim No. W111247-76H and W111248-76H claiming fish and wildlife use for the two decreed rights, the third and twelfth rights, for waters from Skalkaho Creek. These Statements of Claim are clearly labelled Skalkaho Exchange Right.

According to a June 28, 1935, ruling in an action brought against the Ravalli Land and Irrigation Company (now Daly Ditches Irrigation District), Ravalli Land and Irrigation Company, the owner of two large ditches known as the Republican and Hedge ditches which take water from the Bitterroot River and which in their course cross Skalkaho Creek, was exchanging inch for inch the use of water from its two ditches to appropriators from Skalkaho Creek near its mouth, and was taking and using in exchange an equivalent amount of water, the use of which belonged to said appropriators from Skalkaho Creek, diverting and using the same through the ditch known as Ward Ditch whose diversion point is far below all of the complainants in the action. That this exchange was going on at the time of the decree (Skalkaho Creek Decree Case No. 2149), that the decree was entered in light of that fact, and that the same exchange has continued since the decree exactly as it did before. Swifts' decreed water has been and is now delivered by the District which does not deliver water to Reeser Ditch during the winter months. (Department records and testimony of Bernie Swift.)

21. Objector Swift, during the hearing, declared that when persons interfere with a main lateral and violate the law by encroaching into a main lateral without permission and then contend that they want to keep the reservoir when they broke the law, we should have had them breach it when it first came up and then go through the (permitting) process and if they proved they could do it without impact, fine. Now we're after the fact.

22. Objector Newman has filed Statements of Claim No. W36288-76H and W36289-76H. Claim No. W36288-76H is for stock water from an unnamed spring in the $W\frac{1}{2}NW\frac{1}{4}NW\frac{1}{4}$ Section 9. Claim No. W36289-76H claims irrigation from an unnamed spring in the $SE\frac{1}{4}NW\frac{1}{4}NW\frac{1}{4}$ of Section 9. Objector Newman's point of diversion is located approximately one-third mile north of Applicants' point of diversion. Objector Newman believes his springs and the fish hatchery springs are interconnected. Mr. Newman is located in the Snake Creek drainage. (Department records, Applicants' Exhibit 2, and testimony of Objector Newman.)

Objector Newman has taken measurements on his property that he contends show a subtle, but pervasive, degeneration of the "groundwater plumbing system" through the wetland area extending even to the seeps on his property and that the long term effect will be an adverse impact on the integrity of his springs. On July 18, 1981, Mr. Newman measured 282 gpm at a mid-field culvert and 293 gpm in an open channel above the mid-field culvert. On October 13, 1981, Mr. Newman measured 111.6 gpm at the mid-field culvert. On September 8, 1990, Mr. Newman measured 89.3 gpm at the mid-field culvert. On February 20, 1987, Roger W. DeHaan, Professional Engineer with Pinnacle Engineering, measured 134.6 gpm at the county road culvert about 1500 feet north of Mr. Newman's house. (Testimony of Objector Newman and Department file.)

23. Objectors Johnson have filed Statements of Claim No. W108787-76H, W108788-76H, and W108789-76H. Statement of Claim

No. W108787-76H claims stock water from Snake Creek at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31, Township 6 North, Range 20 West. Statement of Claim No. W108788-76H claims stock water from an unnamed spring located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31, Township 6 North, Range 20 West. Statement of Claim No. W108789-76H claims irrigation of 12 acres from Snake Creek at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31, Township 6 North, Range 20 West. During the hearing, Mrs. Johnson expressed concern that a court order would be necessary before Applicants would release water from their dam. (Department records, testimony of Objector Joan Johnson, and Applicants' Exhibit 2.)

24. There is no record that any of the Objectors have a right to appropriate the waste water from the fish hatchery. (Department records.)

25. Applicants are absentee owners. Robert Christ is the manager of their property and has full power of attorney to perform all acts to be done in and about the property. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner.

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2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use, a fish pond and stock water, are beneficial uses of water. See § 85-2-102(2), MCA.

5. Applicants' counsel, in his closing statement, referred the Hearing Examiner to a case recently ruled upon by the Montana Supreme Court, Boylan v. Van Dyke 48 St. Rep. 188. Applicants' counsel interpreted the court's ruling to mean "as long as the lower users were able to get water there is nothing inherently wrong with somebody building a pond on a ditch system that happens to traverse their property."

The Department disagrees with this interpretation. The statutes clearly state that after July 1, 1973, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the Department. See §§ 85-2-301(1) and 302, MCA. In Boylan the water rights issues were specifically excepted by the District Court and the focus of its review narrowed to whether the pond interfered with plaintiff's use of the Tudor Land Ditch. The Court upheld the District Court's ruling that the pond did not interfere with plaintiff's ditch easement.

In the instant case Applicants did divert water from the proposed source and for the proposed use prior to filing an application or receiving a permit to do so. See Findings of Fact 8 and 21.

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties do not include denial of a permit. See §§ 85-2-122 and 46-18-212, MCA.

6. Applicants have a possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 11.

7. The proposed uses would not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 12.

8. Applicants have provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5, 6, 8, and 9.

9. Applicants have provided substantial credible evidence that there are unappropriated waters in the source of supply at the proposed point of diversion in the amount requested and that during the proposed period of diversion the amount requested is reasonably available. See Finding of Fact 7, 10, and 24. It is clear that the full amount of water requested will not be available at all times. However, Applicant is not required to prove the full amount of water is available at all times. All that need be shown is there are sufficient waters to make the project viable. See generally In re Application No. 43117-s41P by Morris Mancoronal, Final Order June 14, 1984.

10. Applicant has provided substantial credible evidence the water rights of prior appropriators will not be adversely affected by the proposed fish pond. See Findings of Fact 9 and 24.

The Objectors have overlooked the obvious. Applicant is not requesting to appropriate additional water from the fish hatchery spring, or from Snake Creek or from Reeser Ditch. Applicant is requesting to appropriate the waste water from the fish hatchery. Applicant would not have a diversion except to divert these waste waters as they come out of the hatchery and the dam on Reeser Ditch. See Findings of Fact 5 and 9. In order to assure Applicants would appropriate only the waste water from the fish hatchery, a third measuring device would be required to measure the amount of excess water from the hatchery discussed in Finding of Fact 6 immediately before it enters Reeser Ditch, and a fourth measuring device would be required to measure the amount of water diverted by the pipe. The measuring device upstream of the pond would determine the amount of Objectors' water flowing in the ditch. Then the Applicants would be required to set the outlet on the reservoir to release all waters except the amount of waste water delivered by the pipeline and the water measured at the third measuring device before it entered Reeser Ditch. No additional burden would be placed upon the springs in Section 9 as feared by Objector Newman. See Finding of Fact 22. The amount of water in Reeser Ditch would not be diminished by the proposed fish pond. Objectors Swift and the District would not be deprived of their Skalkaho water. See Findings of Fact 16 and 20. Objector Swift would not be deprived of the exempt instream stock water he claims on Reeser Ditch. See Finding of Fact 19.

That is assuming Reeser Ditch is a natural stream and that

Objectors Swift are claiming the natural instream flow of Reeser Ditch since it is only the instream flow or groundwater sources that are exempt from the filing order of the Supreme Court. See Finding of Fact 4 and §§ 85-2-212(1) and 85-2-222, MCA. Again, Applicant is seeking to appropriate only waste water from the fish hatchery and more importantly, the pond would be operated as a flow-through pond. After the initial filling of the pond, the amount of water entering the pond would exit the pond. See Finding of Fact 5. The initial filling would be regulated as stated above so that only the waste water would be retained in the pond allowing all other water to pass through.

11. Objectors Johnson would not be adversely affected by the proposed fish pond. Applicants are not proposing to divert from Snake Creek. Snake Creek water enters Reeser Ditch via the lateral downstream from the Applicants' pond and could in no way be affected by the Applicants' pond. See Findings of Fact 15 and 23.

12. Although there is nothing in the record that indicates any of the Objectors have a right to the waste water from the fish hatchery, it is possible that the 250 gpm of waste waters to be diverted and carried to the pond by a pipeline had been used in the past by the Objectors. See Finding of Fact 6, 19, and 24. However, a property owner has the right to use his land as he pleases and has the right to change the flow of waste water thereon as long as the change is not done arbitrarily with malice or negligence. Newton v. Weiler 87 Mont. 164, 179, 286 P. 133

(1930); Ryan v. Quinlan 45 Mont. 521, 124 P. 512, 516. There is nothing in the record to indicate the owners of the fish hatchery acted arbitrarily with malice or negligence in their agreement with the Applicants. See Findings of Fact 6 and 7.

13. Concerning the allegation by the District that there is a water loss through the bottom of Applicants' pond, the District offered no evidence to substantiate such an allegation. See Finding of Fact 17. It was established that the water table in the area was rather high. See Finding of Fact 13. If, in fact, the water table is high enough to be intercepted by the pond, a liner would be ineffective and no water would be lost through the bottom of Applicants' pond. However, if the Applicants cannot release the same amount of water from the pond that is flowing into the pond without losing water, water is probably being lost through the pond bottom. If that should prove to be true, Applicants would be required to line the pond to prevent further loss. That has not been proven at this point. Applicants and Objector Bernie Swift pointed out during the hearing that Reeser Ditch has been altered by other parties which may have caused water loss if, indeed, water was lost. See Finding of Fact 14. There is also the chance that Bender's sump could be mining the water from Reeser Ditch. See Finding of Fact 13.

14. The proposed stock water use would not be administrable. Unlike the fish pond, where the outflow can be regulated to release all other waters except the waste water, the stock would consume up to 7.3 acre-feet of water per year from the fish

pond and Reeser Ditch whether the water was waste water from the fish hatchery or decreed water from Skalkaho Creek. See Finding of Fact 5. The stock consuming 7.3 acre-feet per year of the waste water would cause no adverse effect. However, the stock consuming 7.3 acre-feet of decreed Skalkaho Creek water per year would adversely affect the District and its water users. See Finding of Fact 15 and 16.

15. There was much discussion during the hearing about what would be required for Applicants to release the water in the dam. Upon being told that if a legitimate "call" were made, Applicants would release the water, the District pointed out that Applicants do not live in Montana. When given the name and telephone number of the person who manages Applicants' property, Ms. Birse stated her aversion to calling a junior appropriator. See Finding of Fact 18 and 26.

The appropriative system by its very nature contemplates the supply may be less than the rights therein, as it is the foundation for the rule of which appropriator is to forego exercise of its rights in times of shortage. First in time first in right would never operate if no call were ever made. See MPC v. State ex rel. Carey, 41 St. Rep. 1233, 685 P.2d 386, (1984). The senior water right holder has a duty to call the junior so that the junior will know there is a shortage of water.

WHEREFORE, based upon the foregoing Findings of Facts and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

The stock water portion of the Application is denied.

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use No. 70402-s76H by Joseph and Denise Galbraith is hereby granted to appropriate 585 gpm up to 900 acre-feet of water per year from an unnamed developed spring located in the $SE\frac{1}{2}NE\frac{1}{2}SW\frac{1}{2}$ of Section 9, Township 5 North, Range 20 West, as waste water from an upstream fish hatchery located in the $NW\frac{1}{2}SW\frac{1}{2}$ of said Section 9 for a flow-through fish pond located in the $SE\frac{1}{2}SE\frac{1}{2}NE\frac{1}{2}$ of Section 8, Township 5 North, Range 20 West, with a capacity of 4.5 acre-feet. The point of diversion shall be located in the $NW\frac{1}{2}NW\frac{1}{2}SW\frac{1}{2}$ of said Section 9. The place of use shall be the $SE\frac{1}{2}SE\frac{1}{2}NE\frac{1}{2}$ in said Section 8. The period of diversion and use shall be from January 1 through December 31, inclusive of each year.

1. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana law.

2. This Permit is issued subject to the permanent installation of an adequate drainage device to satisfy existing water rights. This drainage device shall be adjusted to pass through all water except the water measured in the fish hatchery ditch and the water transported to the pond through the pipeline.

3. The Permittee shall install three measuring devices.

Two measuring devices shall be installed on Reeser Ditch; one

shall be located above the pond and the second shall be located below the discharge of the pond. The third measuring device shall be located in the ditch from the fish hatchery immediately before it enters Reeser Ditch. A fourth measuring device shall be located in the pipe which delivers the waste water to the pond.

4. The Permittee shall pass, without significant diminishment in quantity, quality, and timing, the waters conducted down Reeser Ditch.

5. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time and shall submit said records to the Department upon request. This condition is to be in force only until the Permit is quantified through permit verification.

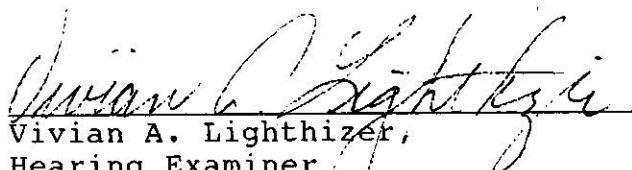
6. If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 21st day of October, 1991.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 21st day of October, 1991 as follows:

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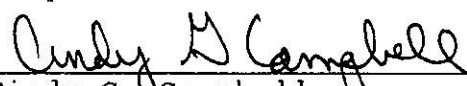
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